

November 12, 2012

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BY FEDERAL EXPRESS

Anthony Herman, Esquire
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: **MUR 6660**
Maine Republican Party v. Americans Elect, et al.

Dear Mr. Herman:

We represent Americans Elect in connection with this matter. This letter constitutes a formal response pursuant to 2 U.S.C. §437g(a)(1) to the complaint filed by the Maine Republican Party against Americans Elect, Angus King, Angus King for Senate, and Eliot Cutler designated as MUR 6660. Thank you for the courtesy of granting our request for extension of time to file this response to and including November 12, 2012. For the reasons stated below, Americans Elect respectfully requests that your office recommend to the Federal Election Commission ("Commission" or "FEC") a finding that there is no reason to believe that the complaint sets forth a possible violation of the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act") and Commission regulations, and close the file in this matter in accordance with 11 CFR §111.7(b). If you need any supplemental information to assist you in making that recommendation, please do not hesitate to contact me directly.

Overview

The complaint fails to set forth "a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction," 11 CFR §111.4(d)(3), based on "documentation supporting the facts alleged if such documentation is . . . available to [] the complainant." 11 CFR §111.4(d)(4). The complaint is based on the grossly erroneous assumption by the Maine Republican Party that Eliot Cutler was serving both as a Director of Americans Elect as well as a Co-Chair of the Angus King for Senate campaign at the time Americans Elect supported King's candidacy with independent expenditures. He was not. The Maine Republican Party further assumes, again erroneously, that the major purpose of Americans Elect is to support Angus King as an identifiable candidate. It is not. The complaint speculates that Americans Elect coordinated its efforts with the Angus King campaign solely because, in the eyes of the Maine Republican Party, any other possibility is "inconceivable." (Complaint, p. 5). Had the Maine Republican Party actually had any concern regarding compliance with the Act, they could easily have clarified both mistaken assumptions with a simple telephone call to Americans Elect. However, the Maine Republican Party's immediate

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media announcements and public release of its complaint before the election, coupled with emails seeking contributions for the Republican candidate for United States Senate that referenced the complaint (see Affidavit of Kahlil Byrd, "Byrd Aff." at ¶14, Ex. G, attached as Exhibit 1), belie the actual purpose of the complaint as an ill-advised and unsuccessful attempt to influence the outcome of the election by filing a sham proceeding and then violating the confidentiality provisions of the regulations.¹

Description of Americans Elect

Americans Elect was organized following the decision of the United States Court of Appeals for the District of Columbia Circuit in *Unity08 v. Federal Election Commission*, 596 F.3d 861 (D.C. Cir. 2010) for the purpose of creating a new process for the American people by internet-based convention directly to nominate qualified persons for President and Vice President of the United States for election in November 2012 outside the current structure of either major political party and to educate and encourage civic engagement by the American people in that new process. (Byrd Aff., ¶2.) The Board of Directors of Americans Elect consisted of Peter Ackerman, Admiral Dennis Blair, Ambassador Stephen W. Bosworth, Kahlil Byrd, Eliot R. Cutler, Irvine O. Hockaday, Jr., Joshua S. Levine, and Governor Christine Todd Whitman. (Byrd Aff., ¶5). With an operating budget in excess of \$35 million, Americans Elect complied with various state ballot access laws to qualify whomever would be selected by the convention to be listed on the ballot in a majority of states as of May 2012. By May 2012, Americans Elect was in the process of qualifying for ballot access in all 50 states and the District of Columbia. (Byrd Aff., ¶3).

Dissolution Process of Americans Elect

In May 2012, it became clear to the management of Americans Elect that no persons would meet the Americans Elect requirement of sufficient popular support to qualify for

¹ The Commission promulgated 11 CFR § 111.21 which provides in pertinent part that "... no complaint filed with the Commission... shall be made public by... any person or entity without the written consent of the respondent with respect to whom the complaint was filed..." The Commission has harmonized that regulation with the underlying statute, 2 USC §437g(a)(12)(A), which refers to confidentiality of "[a]ny notification or investigation made under this section" in a series of decisions that are mindful of "First Amendment considerations applicable when interpreting the scope of confidentiality in the context of election law enforcement procedures." AO 1995-1, n. 2. Nonetheless, the Commission should apply the doctrine of unclean hands to bar complaints from consideration where, as here, the complainant utilized the Commission's limited resources and the pendency of requested investigation as a prop in a pre-election public relations campaign. Cf. *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814, 815 (1945) ("... equitable maxim that 'he who comes into equity must come with clean hands'... that doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith... Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions.") (internal citations omitted).

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consideration at the internet-based convention. The Americans Elect Board thereafter began a process to wind down the organization, withdraw any ballot access where possible, and planned ultimately to dissolve by the end of the year. (Byrd Aff., ¶4). On June 26, 2012, Eliot Cutler and four other outside Directors resigned from the Board of Americans Elect and their resignations were accepted as of that date by the remaining Directors: Peter Ackerman, Kahlil Byrd, and Joshua S. Levine. (Byrd Aff., ¶¶6, 7, Ex. A and B). Cutler specifically noted the planned dissolution in his resignation letter and cited "the termination of Americans Elect's Online Convention" as the reasons for his resignation. (Byrd Aff., Ex. A). The Americans Elect website was updated after the decision was made to wind down the organization to thank all the persons who deserved credit for assisting the organization. Eliot Cutler, as a former Board member along with the other former Board members, was listed on the website under the caption "Credits." (Byrd Aff., ¶5). Cutler had no management role or involvement with Americans Elect after his resignation. (Byrd Aff., ¶6).

Timeline for Angus King Independent Expenditure

On August 6, 2012, more than a month after Eliot Cutler terminated his relationship with the management of Americans Elect, the remaining Directors scheduled a vote to decide whether Americans Elect should make an independent expenditure in the Maine United States Senate campaign to communicate support for the only Independent candidate in the country who was advocating the same principles of unaligned political status that were shared by Americans Elect. (Byrd Aff., ¶8, Ex. C). The Maine race presented Americans Elect with an opportunity to test the premise of its assumptions regarding the electability of an unaligned candidate at the federal level. Interestingly, the Maine Republican Party complaint on its face points to shared goals between Americans Elect and Angus King that predates any involvement by Eliot Cutler. See complaint, p. 6 ("Mr. King. . . was a *founder* of Unity08.") (emphasis in original.)

Upon receiving the Board decision to communicate support for the King campaign effort, the management of Americans Elect developed and circulated to the remaining Directors and all proposed vendors a statement of policy to avoid coordination in federal elections. (Byrd Aff., ¶9). In particular, the management provided the Directors and vendors with a summary one-page description of the policy (Byrd Aff., Ex. D) and also provided a more detailed memorandum of policy that each Director and vendor was required to review, initial and sign before Americans Elect would proceed with the proposed independent expenditure in support of Angus King's election. (Byrd Aff., ¶10., Ex. E). The detailed memorandum explicitly required Directors and vendors to refrain from any coordination with the Angus King campaign, including the following specific provisions:

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- Policy Against Communications Created, Produced or Distributed at the Request of, or with the assent of, a Candidate, an Authorized Committee of a Candidate, or a Political Party Committee;
- Policy Against Material Involvement of Candidates or Agents in AE Expenditures;
- Policy Against Substantive Discussions;
- Policy Against Acquiring Information Through Common Vendors;
- Policy Against Acquiring Information Through Former Employees or Independent Contractors of Candidates;
- Policy Against Dissemination, Distribution or Republication of Campaign Material;
- Policy Against Acquiring Information;
- Policy Against Conveying Information;
- Procedure In Event Prohibited Information Has Been Acquired or Conveyed.

(Byrd Aff., Ex. E, pp. 2-4). Americans Elect thereafter entered into vendor service agreements to make the independent expenditure for television and direct mail in support of Angus King's election. (Byrd Aff., ¶11). Americans Elect timely filed all disclosures required by the Commission regarding its independent expenditures in support of the election of Angus King. The total amount of such expenditures was less than 4% of the Americans Elect operating budget. (Byrd Aff., ¶12, Ex. F).

Analysis Regarding Allegation of Coordinated Expenditure

The Maine Republican Party observed Eliot Cutler's name on the "Credits" portion of the Americans Elect website, incorrectly assumed that he was simultaneously a Director of the organization as well as a co-chair of the King campaign when the independent expenditure was made, and speculated that any support of Angus King by Americans Elect must have been coordinated because any other possibility was "inconceivable." (Complaint at p. 5, emphasis supplied) As demonstrated by multiple contemporaneous documents that corroborate this fact, Eliot Cutler had left the leadership of Americans Elect nearly one and a half months before

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Americans Elect first considered making an independent expenditure to advocate in support of Independent candidate Angus King and all the steps necessary for Americans Elect to decide and then to implement independent expenditures in support of King were made after Cutler had left the organization. King was a co-founder of Unity08 and had expressed the same principles of unaligned political unity shared by Americans Elect. Moreover, Americans Elect engaged in best practices to avoid coordination by informing and then requiring Directors and vendors to comply with its policy regarding non-coordination. Americans Elect also timely filed full disclosures of its independent expenditures as required by law.

The FEC reviews a complaint to determine whether there is "reason to believe that a person has committed, or is about to commit, a violation" of the Act. 2 U.S.C. § 437g(a)(2); 11 C.F.R. § 111.9(a). A communication is "coordinated" if three things are true: (1) someone other than the candidate, an authorized committee or a political party paid for it; (2) the communication concerns certain election matters; and (3) the communication was created and disseminated at the candidate's request or suggestion, or with the candidate's material involvement, or following substantial discussions about the communication with the candidate. 11 C.F.R. § 109.21(a)(1).

There is no dispute that Americans Elect paid for a communication that concerned covered election matters; the sole dispute is whether the allegations satisfy the third "conduct" prong. Allegations of coordinated conduct, however, must be specific. As the Commission noted in MUR 5754, the complaint must "contain sufficient information on which to base an investigation," including the identification of which of the six conduct standards enumerated at 11 C.F.R. § 109.21(d)(1)-(6) were implicated. *See* Factual and Legal Analysis in MUR 5754 (MoveON.org Voter Fund) at pp. 3-4. ("In contrast to the rather vague allegations contained in the complaint, [respondent's] response includes declarations specifically denying each of the elements that would satisfy the 'conduct' standards.") *See also* First General Counsel's Report in MUR 6059 (CFG PAC) at pp. 5-6 (no reason to believe found where the "complaint also merely relied on the inference that the communication had been coordinated [and] . . . complaint fails to provide 'probative information of coordination' . . . [where] Respondents provided a comprehensive response to the allegations that the advertisement was a coordinated communication."). There is no reason to believe that a violation has occurred where a complaint bases its allegations upon "speculative inferences of coordination rather than specific facts." First General Counsel's Report in MUR 6059 (CFG PAC) at p. 7; Legal and Factual Analysis in MUR 6059 (CFG PAC) at p. 5.

Here, Americans Elect has specifically denied that the independent expenditures were made at the request or suggestion of the King campaign or its agents or at the suggestion of Americans Elect and any assent by the King campaign, or with any involvement by the King campaign or its agents in the decision by Americans Elect to make the independent expenditure,

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or after any substantial discussion between Americans Elect and the King campaign - - or their respective agents - - about the plans, projects, activities or needs of the candidate that is material to the creation, production or distribution of this communication, and that no such information was conveyed to any individual paying for the communication. (Byrd Aff., ¶13). Those sworn denials have been corroborated by extensive contemporaneous documents. Weighed against the Maine Republican Party's unsupported assertion that lack of coordination is "inconceivable", there is no reason to believe that Americans Elect violated campaign finance laws by making an independent expenditure in support of Angus King's candidacy.

Analysis Regarding Allegation of Failure to Register and Report as Political Committee

"When determining whether an entity should be treated as a political committee, the standard that has been used is whether a *major purpose* of the organization is to make expenditures or solicit contributions for the nomination or election of candidates." AO 1994 - 25 (emphasis supplied). The Supreme Court has held that, "[t]o fulfill the purposes of the Act," and to avoid "reach[ing] groups engaged purely in issue discussion," only organizations whose major purpose is campaign activity can be considered political committees under the Act. *See e.g. Buckley v. Valeo*, 424 U.S. 1, 79; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986). Accordingly, [t]o fulfill the purposes of the Act [the term 'political committee'] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *FEC v. Akins*, 524 U.S. 11, 26 - 27 (1998) (internal citations omitted).

Americans Elect was not required to register as a political committee because its major purpose was not to support a clearly identified candidate and its internet-based convention process did not yield any candidate. Here, no person received sufficient popular support to qualify for consideration at the internet-based convention that was organized by Americans Elect. (Byrd Aff. ¶4). Indeed, more than 96% of more than \$35 million expended by Americans Elect was devoted to developing the alternative process and obtaining ballot access that had been described by the Court in *Unity08 v. FEC*, 596 F.3d 861, 867 (D.C. Cir. 2010) (Byrd Aff. ¶¶2, 3, 12). The major purpose of Americans Elect already has been considered and decided with respect to its predecessor in interest, Unity08, and cannot be relitigated here.

Americans Elect, unlike a political committee, was not formed and did not act with a major purpose of the election of Angus King or any other clearly identified candidate. Americans Elect is completely independent from any candidates for federal office. The Maine Republican Party's complaint glosses its allegation by acknowledging the "major purpose" requirement and then failing to allege or provide any facts that would create reason to believe that the election of Angus King was the major purpose of the organization. (Complaint, p. 6). Where even the Maine Republican Party does not believe that the "major purpose" of Americans



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Elect is the election of a clearly identified candidate, where the sworn declaration and supporting documents submitted by Americans Elect refute the bald allegation of this complaint, where all independent expenditures were timely and fully disclosed as required by law, and where the constitutional rights of the predecessor organization with the identical major purpose already have been litigated and decided by the federal court, there is no reason to believe that Americans Elect has violated the Act.

Conclusion

For the reasons stated and upon the authority cited, Americans Elect respectfully requests that the Office of General Counsel recommend to the Commission that there is no reason to believe that Americans Elect violated the Act and that the matter be dismissed. Americans Elect reserves its rights to assert the doctrine *res judicata* with respect to matters already decided as to its interests.

Respectfully submitted,

Daniel B Winslow (WDD)

Daniel B. Winslow

cc: Jeff S. Jordan, Esquire (by Federal Express)
Frankie D. Hampton, Paralegal (by Email)